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No. 86-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,
Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,
Respondents.

BRIEF OF THE SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF OF THE SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents, the Southeast Missouri Professional Standards Review Organization, its physician participants and administrator[1] submit this Brief in opposition to the Petition for Writ of Certiorari filed by Petitioners, Dr. Soung O. Kwoun and his related corporations. The opinion of the United States Court of Appeals for the Eighth Circuit, below, is a straightforward application of *Butz v. Economou,* 438 U.S. 478 (1978) to the facts presented. The issues truly raised by this case involve no conflict among the Circuits nor novel doctrinal questions. Therefore, the Writ should be denied.

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[1] A listing of the SEMO PSRO respondents is set forth as Addendum "A" to this Brief.

STATEMENT OF THE CASE

Dr. Soung O. Kwoun is a physician who was suspended from eligibility to participate in the Medicare program and thereafter reinstated in the program through the administrative review process. After being reinstated and receiving full compensation for all past Medicare services provided, Petitioner Kwoun (with his corporations) brought this suit against numerous persons allegedly involved in the suspension decision.

Petitioners named as defendants in this suit some 45 physicians who at one time participated in the operation of the Southeast Missouri Professional Standards Review Organization (SEMO PSRO), the administrator of the SEMO PSRO, officials of the federal Health Care Financing Administration (HCFA), and others. Petitioners claim the various SEMO PSRO officials (including several physicians who are themselves members of minority groups) and the HCFA officials all conspired to suspend Dr. Kwoun's participation in the Medicare program on the basis of his race, denied him due process of law, and committed various common law torts through exercise of their sanctioning authority.

The Administrative Framework of the Medicare Program

The SEMO PSRO is part of a system of local-area peer review established by Congress to aid HCFA, a division of the Department of Health and Human Services (HHS), in the regulation of the Medicare program. 42 U.S.C. §§ 1320c *et seq*. The SEMO PSRO operates through a committee of physicians practicing in the southeast Missouri region, who have volunteered to participate in the PSRO's public responsibilities. See 42 U.S.C. § 1320c-1(b)(1)(A) (Supp. IV 1974).

PSROs are charged by Congress with performance of a variety of review and evaluative functions. Among these functions, a PSRO is required to determine whether physicians are meeting their obligations to provide high quality and reasonably

necessary health care to Medicare recipients. Should a PSRO determine that a physician is violating his obligations under the Medicare program, the PSRO is required to initiate an administrative action against the physician by issuing a report to HCFA charging the physician with case-specific violations and proposing appropriate sanctions. 42 U.S.C. §§ 1320c-4(a)(1), 1320c-6, 1320-9(b)(1) (Supp. IV 1974). The Medicare Act provides extensive procedural safeguards throughout the sanctioning process, including rights to administrative and judicial review.[2]

The Administrative Proceeding Involving Dr. Kwoun

The SEMO PSRO's review began as a result of notification from HCFA that the hospital readmission rate[3] of Medicare patients in the southeast Missouri region was the highest in the nation. (III CA App. 365)[4] The SEMO PSRO's evaluation of the

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[2] Under applicable administrative regulations, following a PSRO's sanction report, HCFA must give the physician notice of the proposed sanction. The physician may obtain oral hearing before HCFA or submit written evidence and argument. 42 C.F.R. §420.102(a) (1980). If a sanction is imposed, HCFA must send the doctor a notice stating the reasons. 42 C.F.R. §420.102(b) (1980). The physician may appeal the decision to an administrative law judge [42 C.F.R. §420.102(b)(3)] for a formal hearing with right of cross-examination and a decision based upon the evidence of the record [42 C.F.R. §§ 405.1502(e), 405.1530, 405.1533 *et seq.*, 405.1547, 405.1557]. Further appeal may be taken to the Secretary's Appeals Council. 42 C.F.R. §405.1561. Judicial review may then be obtained in federal district court. 42 U.S.C. §§ 405(g), 1395(d)(3).

[3] The hospital readmission rate is a standard applied in administering the Medicare program which measures the frequency enrollees are being hospitalized.

[4] The Court of Appeals Appendix is cited as "CA App.", preceded by reference to the volume (I-VII) and followed by citation to the appropriate pages.

problem focused on Poplar Bluff Hospital[5] and ultimately on Dr. Kwoun.

The PSRO initially reviewed the records of patients of the Poplar Bluff Hospital having been hospitalized six or more times. This review was conducted on a blind basis, so that the patient files did not disclose the identity of the treating physician. (I CA App. at 117) Having culled those patient records indicating inadequate care, the PSRO discovered that Dr. Kwoun was the treating physician on an inordinate number of the problem-files. (I CA App. at 143-148) The SEMO PSRO communicated both orally and in writing with Dr. Kwoun and offered Dr. Kwoun other opportunities to meet with the PSRO. (II CA App. at 334-336)

As a result of their evaluation of the patient records, the PSRO officials determined (a) that in 23 specific cases the treatment accorded Medicare recipients by Dr. Kwoun failed to meet professionally accepted standards and (b) that these failings justified their recommendation to HCFA that Dr. Kwoun be suspended from the Medicare program. (I CA App. at 45)

After the PSRO presented their evidence of the 23 alleged violations through a report sent to HCFA and prior to the imposition of sanctions, the Central Office of HCFA sent Dr. Kwoun a notice formally proposing to exclude him from Medicare eligibility for 10 years. The notice further advised Dr. Kwoun of his right to appear in person before HCFA and present written evidence in opposition to the proposed sanction. (I CA App. at 171-174)

Petitioner Kwoun took advantage of this opportunity for a hearing and appeared, with counsel, at the administrative review before the HDFA's Director of Quality Control. During

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[5] The average readmission rate of the 21 hospitals in the southeast Missouri region was 34.1 per 100 patients. Poplar Bluff Hospital's rate was 70 per 100 patients. (I CA App. 117)

the hearing, Dr. Kwoun addressed on a case-by-case basis the patient files identified as giving rise to the administrative charges. (II CA App. at 182-309) The evidence adduced at the HCFA hearing was then submitted to the SEMO PSRO for its further review and analysis. (III CA App. at 383-384) In addition, Dr. Kwoun (through counsel) followed the hearing with lengthy written comments on the PSRO's conclusions respecting each patient file. (II CA App. at 311-316) The SEMO PSRO considered and responded in writing to Dr. Kwoun's comments, adhering to its conclusion that the doctor's treatments were improper. (II CA App. at 317) Dr. Kwoun then submitted further written comments. (II CA App. at 318-332)

After the hearing and the exchange of comments, the HCFA determined Dr. Kwoun would be excluded from particpation in the Medicare Program for a period of ten years pursuant to 42 U.S.C. §1395y(d)(1)(C). The HCFA decision was accompanied by a statement detailing the basis for the suspension and further advised the doctor of his right to a hearing before an administrative law judge (ALJ). (II CA App. at 333-337)

Prior to the effective date of the HCFA decision, Dr. Kwoun filed suit in the United States District Court for the Eastern District of Missouri to enjoin the suspension. *Kwoun v. Schweiker,* 528 F.Supp. 1004, (E.D.Mo. 1981). The court dismissed the suit for failure of Dr. Kwoun to exhaust his administrative remedies. Necessary to ruling that it lacked jurisdiction, the district court independently reviewed the administrative proceedings which had theretofore taken place and specifically held that the administrative actions disclosed no "colorable constitutional claim" and that "the agency will be capable to correct any procedural defects in a later evidentiary hearing." 528 F.Supp. at 1009.

Dr. Kwoun took advantage of the further evidentiary hearing before the ALJ, who found in the doctor's favor. Dr. Kwoun was then restored to full Medicare eligibility and received complete compensation for all Medicare services he had rendered during the period the suspension was under review. (III CA App. at 530) The present suit followed.

REASONS FOR DENYING THE WRIT

Federal officials, engaged in discretionary prosecutorial or quasi-judicial conduct, are protected by absolute immunity not only from common-law claims but also from constitutional or civil rights claims. *Butz v. Economou,* 438 U.S. 478, 508-16 (1978). The present case involves the routine (and correct) application of *Butz* and its progeny to the facts presented. It presents no novel doctrinal issues nor any split among the Circuits.[6]

Entitlement to the immunity afforded by *Butz* turns on the public function being performed, not on an individual's title nor on whether his employer is a governmental agency. See *Austin Municipal Securities, Inc. v. National Association of Securities Dealers,* 757 F.2d 676 (5th Cir. 1985) (stockbroker members of a local disciplinary committee of the securities industry's self-regulatory body absolutely immune in determining whether a brokerage house should be sanctioned). *Accord, Simons v. Bellinger,* 643 F.2d 774 (D.C. Cir. 1980); *Slavin v. Curry,* 574 F.2d 1256 (5th Cir. 1978) (attorney-members of bar disciplinary committees). *See also Gross v. Sederstrom,* 429 F.2d 96 (8th Cir. 1970) (local farmers serving on a committee

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[6] Petitioners attempt to construct a "split among the Circuits" by citing a laundry-list of cases wherein courts addressed the type of immunity to be accorded a variety of officials in cases involving a multitude of differing official functions under widely differing factual situations. These cases are not before the Court. Petitioners point to no Circuit Court decision involving the immunity of PSRO officials, officials acting within the Medicare program, or even officials of any industry or professional self-regulatory body, which conflicts with the decision of the Eighth Circuit here. Petitioners' reference to two cases holding PSROs not subject to the Freedom of Information Act, simply does not get to the issues at hand — whether and to what degree physicians, when performing prosecutorial duties through a PSRO and under a comprehensive federal regulatory program, are entitled to immunity.

determining eligibility to participate in federal farm support programs).[7]

The application of absolute immunity from constitutional tort and common law claims to such persons as stockbrokers (*Austin*) and attorneys (*Simons; Slavin*), exercising their prosecutorial discretion in intitiating disciplinary proceedings within comprehensive regulatory programs, is indistinguishable from the application of absolute immunity to the SEMO PSRO doctors under the facts here. Indeed, Petitioners, themselves, acknowledged in a Brief filed in the Eighth Circuit that the SEMO PSRO defendants stand in the same legal relationship as the disciplinary committee members in *Austin*. In their Brief, Petitioners stated: "[T]he disciplinary officials afforded ab-

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[7] Indeed, professional or industry self-regulatory bodies now occupy an important place in the effectuation of important federal policies and programs. Congress, often times and in a myriad of contexts, has determined that its regulatory objectives are best and most efficiently served by calling upon members of a profession to perform regulatory duties — duties which Congress might otherwise have assigned to agency officials.

The reason is sound: Professionals working in a field or industry and at the local-level, can bring to bear their expertise in the field and their knowledge of local practice and circumstances. Indeed, this is precisely what Congress contemplated in establishing a nationwide network of PSROs. See *Kwoun v. Schweiker*, 528 F.Supp. at 1005. It would most certainly produce an anomalous result if the immunity which would otherwise apply to an agency official would not be applied to protect individuals (not strictly members of a governmental "agency") merely because Congress chose to utilize the greater expertise of these individuals. Compare *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985) with *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978).

All in all, the application of official immunity to persons appointed to serve as governmental experts and to report on what they find within an overall regulatory scheme, is "consistent with protecting 'officials who are required to exercise their discretion' and [with] promoting the 'public interest in encouraging the vigorous exercise of official authority.' " *Bushman v. Seiler*, 755 F.2d at 656 quoting *Butz v. Economou*, 438 U.S. at 506.

solute immunity in *Austin* are analogous to the PSRO physicians in this case. . . ." (Kwoun Brief in Appeal No. 85-2379 at p. 37).

Furthermore, application of *Butz* to the PSRO's prosecutorial conduct is entirely consistent with repeated decisions holding individuals and entities performing oversight and regulatory functions under the Medicare program entitle to official immunity. *See Bushman v. Seiler,* 755 F.2d 653 (8th Cir. 1985) (physician retained by an insurance company serving as a Medicare carrier absolutely immune in a defamation action arising from his investigation of Medicare services provided by two podiatrists); *cf. Evans v. Wright,* 582 F.2d 20, 21 (5th Cir. 1978) (Medicare program integrity specialists investigating plaintiff's provision of health care service and equipment). *See also Peterson v. Weinberger,* 508 F.2d 45, 51-52 (5th Cir.), *cert. denied,* 423 U.S. 830 (1975); *Matranga v. Travelers Insurance Co.,* 563 F.2d 677 (5th Cir. 1977); *Anderson v. Occidental Life Insurance Co.,* 727 F.2d 855, 856 (9th Cir. 1984) (insurance carriers and intermediaries, required to audit and report to HCFA concerning the provision of Medicare services, held "governmental agents" for immunity purposes).[8]

Moreover, the grant of absolute immunity to disciplinary committee members in *Austin, Simons* and *Slavin* and to the SEMO PSRO physicians here is entirely consistent with the three factors identified by this Court in *Butz v. Economou* for the application of prosecutorial immunity. Under *Butz,* absolute immunity from constitutional and civil rights claims

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[8] In other contexts, as well, private-sector entities have been held governmental actors for the purposes of absolute immunity from suit. See, e.g., *Bradley Computer Sciences Corp.,* 643 F.2d 1029 (4th Cir.), *cert. denied,* 454 U.S. 940 (1981); *Becker v. Philco Corp.,* 372 F.2d 771 (4th Cir.) *cert. denied,* 389 U.S. 979 (1967) (holding government contractors and their employees entitled to official immunity from suits arising from reports submitted to the Department of Defense for governmental purposes).

applies where:

(1) The official's functions share the characteristics of the judicial process;

(2) The official's activities are likely to result in recriminatory lawsuits by disappointed parties; and

(3) Sufficient safeguards exist in the regulatory framework to control unconstitutional conduct.

438 U.S. at 510-13. This case presents a textbook illustration of the *Butz* factors.

A. The Exercise of Prosecutorial Decision-Making

Under the first *Butz* factor, absolute immunity extends to administrative officials exercising "broad discretion in deciding *whether a proceeding should be brought* and *what sanctions should be sought.*" 438 U.S. at 515 (emphasis added).

Here it was the job of the SEMO PSRO physicians to exercise their medical expertise in the enforcement of the Medicare Act. Their review began with an analysis of the general problem of high hospital readmissions within their region, but quickly focused on a specific physician, Dr. Kwoun, whose patient records indicated an inordinate numer of readmissions and, moreover, inadequate care to Medicare recipients. Faced with these records, the PSRO physicians had to determine, in the exercise of their medical judgment, whether and, if so, which specific patient cases revealed violations of Medicare program standards. And, upon this evaluation, they had to and did, in fact, determine "whether a proceeding should be brought" against Dr. Kwoun and "what sanctions should be sought." *Butz,* 438 U.S. at 515.

This decision-making process is precisely that held immunized by the District of Columbia Circuit in *Simons v. Bellinger,* 643 F.2d at 784, with respect to the evaluative efforts related to a bar disciplinary committee's decision to initiate a case. The court in *Simons* held:

> "At some point the prosecutor's inquiry becomes sufficiently focused so that he is preparing a case against a particular defendant rather than seeking a defendant against whom he may prepare a case. At his point, his efforts become advocatory: they are intimately associated with the sensitive decision of whether or not to initiate a particular prosecution, a decision which is left to advocates, not investigators."

Accord, Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979); *Atkins v. Lanning,* 556 F.2d 485, 488 (10th Cir. 1977). Indeed, protection of a prosecutor's investigation is necessary because "[t]o grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decision-making and the potential for needless actions." *Forsyth v. Kleindienst,* 599 F.2d at 1215.

B. The Likelihood of Recriminatory Suits

The protection of officials intimately involved in a prosecutorial decision serves an important public purpose. Addressing the second *Butz* factor, this Court expained: "The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted *if their immunity* from damages arising from that decision *was less than complete.*" *Butz,* 438 U.S. at 515 (emphasis added).

The concern expressed in *Butz* is especially pronounced here. The administration of the Medicare Program requires enforcement of professionally accepted standards of health care and Congress chose to use medical experts through the PSROs — rather than agency officials — to evaluate whether a physician was meeting these standards and to bring charges if the physican was not. If the experts are inhibited from exercising their professional judgment by fear of retaliatory suits, the intended benefits of their unique expertise will be lost. *Cf. Austin*

Municipal, 757 F.2d at 689 (self-regulatory body's members are likely targets for suit).

Thus, where, as here the success of a federal program depends on the effort of private individuals who volunteer to undertake an important public service, the need for the absolute immunity is profound. Commenting on the necessity of absolute immunity for attorneys voluntarily participating on a bar disciplinary committee, the court in *Simons* stated: "Perhaps, without this [absolute] immunity, membership on the Committee would be transformed from a distinguished achievement in public service to an invitation to become a defendant in costly, time-consuming litigation." 643 F.2d at 782.

This necessary application of absolute immunity to officials when functioning, as the PSRO here, in a prosecutorial capacity is entirely consistent with the limitation of liability provision of 42 U.S.C. §1320c-6(b) (relied on by Petitioners for their argument that the PSRO officials should only be accorded qualified immunity). The Eighth Circuit's finding, below, that §1320c-6(b) is not applicable to the PSRO officials when functioning as prosecutors is supported by reason and authority. (*See* Petitioner's Appendix at 33a-35a, n.13).

The doctrine of official immunity bars (a) common-law claims against an official arising out of his public duties and (b) all claims arising out of the performance of prosecutorial duties. On the other hand, §1320c-6(b), far more broadly, bars all civil and criminal liability for all persons performing any services for PSROs if those persons have exercised "due care."

While the initiation of an administrative prosecution is one function of a PSRO, Congress has also charged the PSROs with a wide range of other duties in the administration of the Medicare program. The discharge of many of these day-to-day statutory duties could give rise to statutory claims against per-

sons aiding the PSRO — claims which in many cases would fall out side of the scope of any common law immunity.[9]

Moreover, §1320c-6(b) is not a liability provision. It does not require liability for failure to exercise "due care." As such, the statutory provision cannot be said to foreclose established common law immunities applicable to particular claims and particular and narrow functions of the PSRO. Statutes are to be construed consistent with common law rights and are to be narrowly construed so as not to interfere with common law rights. *See, e.g., United States v. Tilleraas,* 709 F.2d 1088, 1092 (6th Cir. 1983); *Ducey v. United States,* 713 F.2d 504, 510 (9th Cir. 1983). Indeed, even where a statute *expressly* imposes liability, as for example, the Civil Rights Acts, this Court has held that courts should be circumspect in finding that Congress intended to impose liability in situations where common law immunities would otherwise apply. See *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 258 (1981).[10]

In short, the exercise of prosecutorial discretion is one official function that courts have consistently held requires absolute immunity. *Butz,* 438 U.S. at 515; *Austin Municipal,* 757 F.2d at

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[9] For instance, §1320c-6(b) might apply to a statutory claim against a physician who assisted the PSRO in determining, pursuant to §1320c-3, that certain claims should not be paid; though he would be entitled to the protection of §1320c-6(b), such a physician would not be protected by official immunity, since the claim was not a common law claim and did not arise out of performance of prosecutorial duties. Thus, the limitation of liability of §1320c-6(b) will frequently apply to different sorts of claims and to different persons than the common law doctrine of official immunity.

[10] Furthermore, the existence of statutory immunities applicable in certain circumstances, does not foreclose resort to common law immunities in other situations where such immunities traditionally apply. *See Mendez v. Belton,* 739 F.2d 15, 19 (1st Cir. 1984).

687 ("holding some official positions, however, require greater protection than qualified immunity provides"). Accordingly, there is no reason to suppose that the application of absolute immunity to a PSRO's occasional exercises of prosecutorial authority is inconsistent with §1320c-6(b).

C. Safeguards Provided by the Regulatory Framework

Through the Medicare Act, Congress has carefully tailored a multi-tiered procedural safety net for the administration of payments to and the sanctioning of health care providers under the program. *See* Note 2, *supra*. *Cf. Austin Municipal*, 757 F.2d at 689. Dr. Kwoun vigorously took advantage of his procedural rights throughout the administrative process. He received:

- Oral and written communications with the PSRO during its evaluative process.
- Notice from HCFA of its intent to suspend his Medicare eligibility.
- A pre-suspension hearing before HCFA, at which he (with counsel) presented evidence on each of the PSRO's charges.
- The opportunity to twice submit written comments on the charges to HCFA prior to the suspension decision.
- Judicial review of the constitutionality of the administrative procedures leading up to the suspension. *Kwoun v. Schweiker, supra*.
- A post-suspension evidentiary hearing before an ALJ, which found in his favor.[11]

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[11] Furthermore, had Dr. Kwoun not prevailed before the ALJ, he would have been entitled to an administrative appeal to the Secretary's Appeal Council and then to judicial review of the sanction in federal court.

- Reinstatement in the Medicare Program and full compensation for Medicare services he rendered.

These procedures clearly provide a more than an adequate check on the possibility of unconstitutional conduct, fulfilling the third requirement of *Butz* for the application of absolute prosecutorial immunity. Indeed, in *Kwoun v. Schweiker,* the court expressly found that the administrative record disclosed "no colorable constitutional claim" and that "the agency will be capable to correct any procedural defects in a later evidentiary hearing." 528 F.Supp. at 1009.[12]

Petitioners' present contentions that (a) due process requires greater proceedings than he was accorded (specifically, a "full pre-suspension hearing") and (b) a damages remedy (including punitive damages and attorneys fees) is necessary, are simply unjustified by the administrative record and established law. Absolute immunity to PSRO officials engaged in prosecutorial decision-making is entirely consistent with the procedural and remedial protections available through the Medicare framework. And, the Medicare program's procedures and remedies are, likewise, entirely consistent with due process.

Petitioners simply are not entitled, by virtue of asserting some constitutional claim, to remedies beyond reinstatement in the Medicare program and compensation for Medicare services

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[12] Consistent with the findings in *Kwoun v. Schweiker,* this Court stated in *Butz:*

> "The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an indepen dent judgment as to whether the prosecution is justified. His claims that the proceeding may be unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review." 438 U.S. at 515-16.

rendered. This Court has long recognized that the review and remedial procedures available under a comprehensive regulatory statute may be exclusive and, indeed, preclude the full scope of remedies (such as punitive damages and attorneys fees) as may be available through a civil rights or constitutional tort action. *Bush v. Lucas,* 462 U.S. 367, 378-390 (1983); *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Company,* 379 U.S. 411, 420 (1965) (holding "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive"). *See also Franks v. Nimmo,* 796 F.2d 1230, 1240 (10th Cir. 1986) (dismissing a doctor's constitutional tort suit arising from his discharge from a government hospital on the grounds that remedies available through administrative review, "reinstatement and back pay," provide "meaningful relief" to the exclusion of further remedies).

The often recognized limitation of remedies to those available under a comprehensive administrative statute is based on the same policies which underlie the grant of absolute immunity to federal officials. This Court observed in *Bush:*

> "The costs associated with the review of disciplinary decisions are already significant — not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. . . . [I]t is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct . . . , they would be deterred from imposing discipline in future cases."

462 U.S. at 388-89. Cf. *Butz,* 438 U.S. at 515-516 quoted at Note 12, *supra.*

Moreover, the administrative procedures provided by the Medicare Act and accorded Dr. Kwoun fully meet the requirements of due process. Petitioners' contention that Dr.

Kwoun was constitutionally entitled to and denied a "full pre-termination hearing" ignores the doctor's appearance before the HCFA administrator and his further submission of written comments and, in any event, misconceives the law.

It is firmly established that due process does not require that a health care provider receive a full hearing prior to suspension or termination from the Medicare program. *See Koerpel v. Heckler,* 797 F.2d 858 (10th Cir. 1986); *Ritter v. Cohen,* 797 F.2d 119 (3d Cir. 1986); *Geriatrics, Inc. v. Harris,* 640 F.2d 262 (10th Cir.), *cert. denied,* 454 U.S. 832 (1981); *Northlake Community Hospital v. United States,* 654 F.2d 1234, 1241-43 (7th Cir. 1981); *Town Court Nursing Center, Inc. v. Beal,* 586 F.2d 266, 276-78 (3d Cir. en banc 1978). Under these authorities, the pre-termination process need not be elaborate but should include "oral or written notice" and an "opportunity to present his side of the story." *Koerpel,* 797 F.2d at 868. Due process is satisfied when the pre-suspension opportunity to be heard provides an "initial check against mistaken decisions" and a full post-termination hearing is given. *Id.*

Reaching this conclusion under the due process analysis set forth in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Circuits have focused on the essential purpose of the Medicare program — the provision of quality and necessary health care to the elderly and disabled. Because of the need to insure that the intended beneficiaries of Medicare are receiving quality treatment without abuse of federal resources, the Circuits have found the government's interest in the expeditious suspension of doctors from the Medicare program is substantial. These courts have also determined that under the statutory review procedures, the likelihood of an erroneous termination from Medicare going uncorrected is not substantial. *See, e.g., Koerpel,* 797 F.2d at 864; *Northlake,* 654 F.2d at 1242 & 1244-45.

Moreover, the courts have found the physician's interest in a full pre-suspension hearing not of constitutional significance. A suspended physician "may seek private patients" and "may

continue to treat [Medicare] patients and, if he prevails in his appeal, will be eligible for reimbursement." *Ritter,* 797 F.2d at 123.[13] Indeed, as Justice Powell observed in *Arnett v. Kennedy,* 416 U.S. 134, 169 (1974) (concurring op.), an individual's interest in receiving a pre-termination hearing is not constitutionally significant where (as here) he "would be reinstated and awarded backpay if he prevails" in the post-termination hearing.

Dr. Kwoun quite clearly received notice of the charges and the opportunity — which he vigorously exercised — to "present his side of the story" prior to the HCFA suspension decision. *Koerpel v. Heckler,* 797 F.2d at 868. He received a full post-suspension review and through review obtained reinstatement in the Medicare program and backpay — in the form of reimbursement for Medicare services rendered. *Arnett,* 416 U.S. at 169; *Franks,* 796 F.2d at 1240. In short, Dr. Kwoun received precisely the review and remedies which the Medicare Act and due process contemplate.

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[13] While termination or suspension from the Medicare program may have a significant financial impact on a health care provider, a provider is "*not* the intended beneficiary of the Medicare program" and his "financial need to be subsidized for care of [his] Medicare patients is only 'incidental to the purpose and design of the Medicare program.' " *Northlake Community Hospital,* 654 F.2d at 1242 (emphasis original).

CONCLUSION

For the reasons set forth above, the application of absolute immunity to the SEMO PSRO Respondents derives from a straight-forward application of this Court's decision in *Butz v. Economou, supra,* to the facts of this case. Fully satisfying the *Butz* standards — (1) The PSRO functioned here in a prosecutorial capacity; (2) This prosecutorial decision-making is likely (as this suit well illustrates) to result in recriminatory lawsuits; and (3) The Medicare Act provides elaborate administrative safeguards to control any unconstitutional conduct. The Writ should be denied.

Respectfully submitted,

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Dated: July 2, 1987

ADDENDUM

In addition to the SEMO PSRO, itself, the SEMO PSRO Respondents are:

1. James Armantrout, D.O.
2. Larry Baker
3. Michael K. Blank, M.D.
4. Joseph Blanton
5. William V. Booth, M.D.
6. Edwin K. Burford, M.D.
7. Jean A. Chapman, M.D.
8. David Clark, M.D.
9. R.F. Dettmer, M.D.
10. D.E. Edwards, M.D.
11. Gordon Eller, M.D.
12. Bettie Sue Fikki
13. Jose H. Gonzales, M.D.
14. Terry Guiley, D.O.,
15. Tom Henderson, M.D.
16. W.E. Hendrickson, M.D.
17. T.O. Honaas, M.D.
18. Robert C. Hoye, M.D.
19. Randall Huss, M.D.
20. W.W. Hutton, D.O.
21. Christopher Jung, M.D.
22. Earle Kennedy, D.O.
23. Robert M. Kepner
24. G.H. Ladyman, M.D.
25. John K. Legan, M.D.
26. Gene Leroux, M.D.
27. R.E. Marts, D.O.
28. A.G. Miranda, D.O.
29. George McAnelly, , M.D.
30. Charles P. McGinty, M.D.
31. Jesse Page, M.D.
32. Pin Pu, M.D.

33. Vinai Radsakulthai, M.D.
34. Martha Reed, M.D.
35. Raymond A. Ritter, M.D.
36. Robert Robbins, D.O.
37. Eugene Ruff, M.D.
38. A.N. Sandler, D.O.
39. Allen Spitler, M.D.
40. Clifford Talbert, M.D.
41. Ben Till, M.D.
42. Austin Tinsley, M.D.
43. A.T. Tuma, M.D.
44. Kirby Turner, M.D.
45. Barry B. White, M.D.